IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No.

76-30

ROBERT DIACO and JOHN HOLLAND,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Joint Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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FREDERIC C. RITGER, JR.,
Counsel for Petitioners,

106 Valley Street,
South Orange, New Jersey 07079
(201) 762-3023

N.J. Appellate Printing Co., Inc., South Plainfield, New Jersey (201) 753-0200

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No.

ROBERT DIACO and JOHN HOLLAND,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Robert Diaco and John Holland, petitioners, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled cases on June 15, 1976.

OPINION BELOW

The opinion of the Court of Appeals for the Third Circuit by Judgment Order is not reported and is printed as Addendum A.

JURISDICTION

The judgment of the Third Circuit Court of Appeals was entered on June 15, 1976. The jurisdiction of this court is invoked under Title 28 U.S. Code, Section 1254 (1).

QUESTIONS PRESENTED

1. Whether the petitioners were denied a fair trial and due process when the court refused to order a psychiatric examination of the alleged victim where evidence of mental instability was presented.

2. Whether the unnecessary reliance upon hearsay testimony before the grand jury will invalidate an indictment as a violation of Amendment V of the Constitution of the United States.

3. Whether upon the facts of the instant case a judgment under the Consumer Credit Protection Act should be reversed because of lack of jurisdiction in the United States District Court.

CONSTITUTIONAL PROVISIONS INVOLVED

1. Fifth Amendment to the Constitution of the United States.

2. Tenth Amendment to the Constitution of the United States.[1]

STATUTES INVOLVED

Title 18 U.S. Code, Section 891 and Title 18 U.S. Code, Section 894.[2]

1. Reprinted as Addendum B.
2. Reprinted as Addendum C.

STATEMENT OF THE CASE

The petitioners, Robert Diaco and John Holland were indicted by a Federal grand jury in the District of New Jersey and charged in two counts with violations of Title 18 U.S. Code, Section 894. The First Count charged a conspiracy to use extortionate means to collect an extension of credit. The Second Count charged the use of extortionate means in an attempt to collect an extension of credit. Both were convicted after a jury trial. Diaco was sentenced to a term of 18 months imprisonment and a fine of $5,000.00 on the indictment. Holland was sentenced to a term of 18 months, to be confined for six months and to be placed on probation for two years from the date of release on Count I and to the same penalty concurrently on Count II together with a fine in the amount of $2,500.00. Both petitioners to stand committed until the fines are paid.

Prior to trial, petitioners moved for an Order requiring that the alleged victim of the offenses submit to a psychiatric examination. Supporting that motion, were several affidavits, one by the estranged wife of the alleged victim concerning physical mistreatment of her during the period of their marriage and irrational conduct by victim. Another affidavit by the wife's mother concerning physical mistreatment of her, and a third affidavit by a former employee who indicated an attempt by the alleged victim to intimidate her and to keep her from testifying on behalf of Diaco and Holland. The third affidavit further indicated a threat made by the alleged victim upon the life of the potential witness. The court denied the motion.

During the course of the trial at the end of the case for the prosecution, and again at the completion of all of

the evidence, petitioners moved for judgment of acquittal on the ground that the government had failed to substantiate with its proofs an offense of sufficient magnitude to warrant prosecution under the provisions of Title 18 U.S. Code Section 894. They further moved to dismiss the indictment on the ground that it was obtained without the testimony of the only fact witness who could testify direcly as to the allegations of the indictment.

The same motions were renewed after the verdict and all motions were denied by the court.

The facts of the alleged violation are as follows: John Holland, and the alleged victim, Vincent Bono, had for several years operated an employment service as partners. They subsequently split up and as part of their separation agreement, Bono was to pay Holland approximately $30,000.00. Of the $30,000.00, Bono paid $7,800.00 between the date of separation and October of 1973. After that date, Bono stopped paying Holland and on or about March 13, 1974, he received that he characterized as a threatening telephone call from a person who had an extremely heavy Italian accent (not either petitioner). Since the caller made reference to the fact that Bono owed money to Holland, Bono got in touch with Holland and later arranged with Holland for a meeting in Holland's office. The meeting was attended not only by Holland but by Diaco and at that time, Bono was allegedly threatened by Diaco. The outcome of the meeting was that the obligation due to Holland was reduced in amount and Bono was given several days to pay $2,500.00. Subsequently, he was to pay a small amount each month for several years. When he failed to come up with the money by the date agreed, Bono called the F.B.I. and told a representative of the Bureau that he thought he was about to be killed. Several days later under the instructions of the

F.B.I. and equipped with an electronic device, Bono met with Holland and Diaco, and their conversation was recorded. After that meeting was completed, Bono advised the F.B.I. that he was no longer afraid that he was in danger and nothing was done by the government with the case until approximately a year and a half later when the indictment was returned. Diaco had no further contact with Bono and no subsequent threats or harm came to Bono although he paid no additional moneys to Holland.

REASONS FOR GRANTING THE WRIT

1. This court should exercise supervisory power over the administration of justice in the Federal courts by establishing a practice which will enable the defendant in a criminal case to obtain a psychiatric examination of the principal witness against him.

In this case, the petitioners moved prior to trial for such an examination of the witness, Bono. The motion was based specifically on allegations of several affidavits, one affidavit by the wife of the witness concerning physical mistreatment of her during the period of their marriage. Another affidavit by the mother-in-law of the witness concerning physical mistreatment of her. A third affidavit by a former employee who indicated an attempt to intimidate her, a potential witness, and further, a threat upon her life by Bono.

Since Bono was, for all intents and purposes, the only witness to the essential elements of the alleged offense, it was particularly important that the defendants be given the opportunity to investigate his competency and his credibility by the use of an expert.

It is the position of petitioners that the court should have required Bono to undergo a psychiatric examination

based solely upon the affidavits and general background within the knowledge of the court at the time that the motion was made.

Rule 607 of the *Federal Rules of Evidence* provides,

> "The credibility of a witness may be attacked by any party, including the party calling him."

Rule 608 of the *Federal Rules of Evidence* provides in part that credibility may be attacked in the form of opinion evidence directed specifically to character for untruthfulness. Specific instances of conduct may be inquired into on cross-examination in the discretion of the court, where probative. Of course, the rules of evidence with reference to witnesses (Article VI, Federal Rules of Evidence) are based upon the general principle that in a criminal case every person is competent to be a witness except as otherwise provided in the rules. Competency is generally accepted as a term which signifies the fitness of an individual to testify in a legal proceeding, 3 *Jones On Evidence*, §20:1.

In recent years there has been an increasing tendency on the part of the courts to allow expert psychiatric opinion testimony as to the credibility and character traits of a witness. See Richardson, *Modern Scientific Evidence*, §8.28 (1961). Accompanying the above tendency is a like inclination on the part of the court that it is better not to exclude a witness for mental incapacity or immaturity but to let the evidence come in for what it is worth, with cautionary instructions. *United States v. Jones*, 482 F.2d 747 (D.C. Cir. 1973). Because it may be difficult, if not impossible, for the untrained observer to detect aberrations in the demeanor or social attitude of a mentally disturbed witness, it has been held that expert testimony as to the mental unsoundness of a witness is admissible to

impeach the credibility of the witness. Therefore, while a witness with a mental illness will not generally be excluded from the witness stand, the defendant should be allowed to bring evidence of such illness to the attention of the jury. *United States v. Hiss*, 88 F. Supp. 559 (S.D. N.Y. 1950), was a prosecution where the outcome was dependent to a great extent upon the testimony of one man, Whittaker Chambers. The court when dealing with the admission of psychiatric testimony concerning Chambers, held that proof of the existence of insanity or mental derangement is admissible for the purpose of discrediting a witness. The court, in the *Hiss* case allowed a psychiatrist to testify on the behalf of the defendant concerning courtroom observations of the witness, Chambers. It is submitted that such a procedure is far from reliable and is not a substitute for an actual examination by the expert. See Jones, *Admission of Psychiatric Testimony in Alger Hiss Trial*, 11 The Alabama Law, 212 (1950); Cf. Conrad, *Psychiatric Lie Detection*, 21 F.R.D. 199.

In the State of New Jersey, in *State v. Butler*, 143 A2 530, 27 N.J. 560 (1958), the Supreme Court of New Jersey held that the trial court had the inherent power to compel a witness to submit to a pretrial psychiatric examination as to his mental competency. The court further suggested that such examination be made prior to trial so that the court can consider it not only on the question of competency to testify, but on the credibility of the witness. See *State v. Franklin*, 229 A.2d 657, 49 N.J. 286 (1967); *State v. Burno*, 156 SE 781, 200 N.C. 267 (1931); *Mangrum v. State*, 299 SW 2d 80, 227 Ark. 381 (1957); *Ballard v. Superior Court*, 410 P.2d 838, 64 Cal. 2d 159 (1966). IIIA *Wigmore on Evidence* (Chadbourn Revision) paragraph 924a. See also *United States v. Dildy*, 39 F.R.D. 340 (D.C. D.C. 1966).

There seems to be no reason why, if there is an indication of antisocial or extreme behavior of a kind which might demonstrate mental illness, that the court should not order a psychiatric examination. This was the result reached in *Taborsky v. State*, 116 A.2d 433, 142 Conn. 619 (1955); *People v. Foller*, 242 N.Y.S. 758, 229 App. Div. 789 (1930) and *People v. Cieplinski*, 103 N.Y.S. 2d 391 (Gen. Sess. 1951). See also *People v. Rensing*, 250 N.Y.S. 2d 401, 199 NE 2d 489 (1964).

As we have already stated, the rules of evidence contemplate a presumption of competency. If a witness's competency to testify is challenged the burden rests upon the party objecting. It becomes a matter for the sound discretion of the court as to whether or not the witness should be allowed to testify. *Henderson v. United States*, 218 F.2d 14 (6th Cir. 1955). The courts are inclined to allow any witness to testify leaving the question of credibility to the jury.

In a case such as the one before the court here, the defendant is powerless to call experts on the question of competency or for the purpose of affecting credibility unless the experts can examine the witness. We do not advocate a general policy whereby all witnesses in criminal cases should be subjected to psychiatric examinations, but it is submitted that where the defendant can demonstrate that the witness has followed a pattern which indicates behavior out of the norm, then it is imperative that the court order examination.

In this case, the affidavits which were presented to the court supported the contention of petitioners that the principal witness to be called by the government was, during the period involved, suffering from some type of mental disturbance. It is argued that if the jury were to

be presented with the question of the witness' credibility, it could only be done properly by way of expert testimony.

In answer to the usual arguments made against the requirement that a witness be subjected to a psychiatric examination it would appear that the type of relief sought is no more stringent than that which has been afforded to law enforcement authorities by the Supreme Court. The Supreme Court has required a defendant, who is presumed to be innocent, to submit to various examinations. See *Schmerber v. California*, 384 U.S. 757 (1966); *United States v. Dionisio*, 410 U.S. 1 (1973) and *United States v. Mara*, 410 U.S. 19 (1973).

We do have a concern for the right of privacy of the witness and understand, but do not over-exaggerate, the possible effect of a court ordered psychiatric examination. Fundamental fairness and a concern for the right of a defendant, particularly, where there is an indication that the principal witness against him is unstable and inclined to erratic action requires that the court order the examination.

2. This court should exercise supervisory power over the administration of justice in the Federal Courts and proscribe the practice which makes a mockery of that part of the Fifth Amendment to the Constitution which requires indictment by grand jury.

We understand that this court has on prior occasions dealt with the question of the type and character of evidence which is required to be presented to a grand jury in order to meet the standard of the Fifth Amendment. See *United States v. Calandra*, 414 U.S. 338, 344 (1974); *Costello v. United States*, 350 U.S. 359 (1956).

It is submitted that the fact situation in this case is different from the others with which the court has

dealt in the past. Here there was only a single witness who could actually testify to the alleged threats which lead to the charged criminal violation. That witness was Vincent Bono who was readily available and could have been called before the grand jury at any time. Instead, the United States Attorney deemed it proper to call an agent of the F.B.I. who recited what he had been told by Bono, and further, gave a summarized version of what appeared on the tape recordings made of a telephone call between Bono and Holland and the conversation among Bono, Holland and Diaco. During the course of the trial, Diaco raised the question for the first time when it became obvious that Bono had not testified before the grand jury. At that time, Diaco moved that the court examine the transcripts to determine whether probable cause had been proven before the grand jury. The court deferred any action on Diaco's motion pending the completion of the case. Subsequent to the verdict, petitioners again moved to dismiss the indictment on the basis that the grand jury had not had a probable cause submission. The court refused to allow petitioners to see the grand jury transcripts, however, the court did review and seal the transcripts for possible appellate review, and denied the motion.

The grand jury as an instrument designed to protect and guarantee the rights of the individual against the excesses of the prosecutor has been the subject of numerous discussions by legal authorities. *Rivera v. Government of Virgin Islands*, 375 F.2d 988, 991 (3rd Cir. 1967). It has also been recognized that the grand jury can reflect the conscience of the community in providing relief where strict application of the law would prove unduly harsh. See *Gaither v. United States*, 413 F.2d. 1061 (D.C. Cir. 1969). In *Ex Parte Bain*, 121 U.S. 1 (1886), it was said,

> "It remains true that the grand jury is as valuable as ever in securing . . . . individual citizens from an open and public accusation of crime and from the trouble, expense and anxiety of a public trial before probable cause is established by the presentment and indictment of such a jury. . . ."

See also *Wood v. Georgia*, 370 U.S. 375, 390 (1962). It is well established that the test to be applied by the grand jury in voting upon an indictment is whether there is probable cause to believe that the accused has committed a crime. *United States v. Cox*, 342 F.2d 167 (5th Cir. 1965); *cert. den.* 381 U.S. 935 (1965).

It is the position of the petitioners that the wholesale use of hearsay or other "inadmissible" evidence tends to destroy the historical function of the grand jury in assessing the likelihood of prosecutorial success, and further, destroys the protection from unwarranted prosecution that grand juries are supposed to afford the innocent. See *United States v. Umans*, 368 F.2d 725, 730 (2nd Cir. 1966); *cert. dismissed* 389 U.S. 80 (1967). *Cf. United States v. Leibowitz*, 420 F.2d 39, 41 (2nd Cir. 1969); *United States v. Aloisio*, 440 F.2d 705, 708 (7th Cir. 1971). In *United States v. Arcuri*, 282 F. Supp. 347 aff'd 405 F.2d 691 (2nd Cir. 1968), *cert. den.* 395 U.S. 913 (1969), the court in the Eastern district of New York called the practice of relying upon hearsay rather than on the testimony of the observers of the events as "pernicious" for two reasons. The first because the grand juries do not hear the cases with the rough edges that result from the testimony of "honest" observers of the event and are unable to distinguish between prosecutions which are strong and those which are relatively weak; and secondly the practice results in preventing the defendant from utilizing grand jury testimony in cross ex-

amining the witnesses who will testify at the trial. See also the dissent in *United States v. Beltram*, 388 F.2d 449 (2nd Cir. 1968), where Judge Medina stated,

> "What is the use of such a practice established in the cause of truth and justice, if the prosecutor can in effect return to the old system by the simple expedient of withholding key witnesses from the grand jury hearing."

The present state of the law would seem to be a result of a balancing between the needs of an expeditious prosecution as against the rights of the defendant. For example, in *Costello v. United States*, 350 U.S. 359 (1956), the court was dealing with an income tax prosecution based upon a "net worth" method of proof. It is suggested that the Supreme Court directed its decision toward the peculiar circumstances involved in a "net worth" prosecution in which the government must usually rely upon large numbers of witnesses who testify as to purchases of material or supplies and produce documents or checks which are rarely contested as to their credibility. It is further suggested that the Supreme Court did not intend to abrogate the grand jury provisions of the Fifth Amendment of the Constitution.

We make this argument in the framework of the present case for the reason that not only did the petitioners have reason to question the mental competency and believability of the complaining witness but the grand jury was deprived of seeing and judging for itself the character of the individual. In *United States v. Estepa*, 471 F.2d 1132, 1136 (2nd Cir. 1972), the court stated that the founding fathers were not engaging in a mere verbal exercise when they drafted the Fifth Amendment's guarantee to indictment by a grand jury. An accused has the right to have the grand jury make the charge on its own

judgment. *Stirone v. United States*, 361 U.S. 212, 219 (1960). In *United States v. Gallo*, 394 F. Supp. 310 (D.C. Conn. 1975), the court held that a prosecutor cannot deny such a substantial right to accused by depriving the grand jury of its opportunity to evaluate the credibility of witnesses. The Court of Appeals for the Third Circuit in its Judgment Order in the case herein (at footnote 4, Addendum A) states,

> "While it might have been better practice to have Bono testify before the grand jury, see ABA standards relating to the prosecution function, Section 3.6(a), it was not required."

We take issue with the court at that point. We contend that not only was it the better practice but in order to remove any question of compliance with the requirements of the Constitution it was mandatory.

3. The court should declare it unconstitutional to enforce the provisions of the Consumer Protection Act in cases where there is no impact upon interstate commerce and no connection with "organized crime."

The petitioners were indicted under Title 18 U.S. Code Section 894 in two counts, both dealing with the concerted action to obtain a collection of an obligation by "extortionate means."

When the *Consumer Protection Act* (82 Stat. 159) 18 U.S.C. Section 891 *et seq.* was enacted by Congress and signed into law, Congress made certain findings related to the fact that "organized crime" obtains a substantial part of its income from extortionate credit transactions.

We have reviewed the reported cases which have dealt with *Title 18, Section 894*, and have, of course, begun with *Perez v. United States*, 402 U.S. 146 (1971), and

have found that with very few exceptions all of the cases fall clearly within the area in which Congress indicated it was seeking to deal. In *Perez*, Justice Douglas made it clear immediately as does the opinion in the Second Circuit (426 F.2d 1073, 2nd Cir. 1970) that Perez was one of a species commonly known as "loan sharks." The Justice further indicated that there was ample evidence showing he was a "loan shark" who used the threat of violence as a method of collection.

There was no difficulty in that case to find that Perez was clearly a member of the class which engaged in extortionate credit transactions as defined by the Congress (18 U.S.C. Section 891), and finally in Perez, the court stated,

> "We relate the history of the act in detail to answer the impassioned plea of petitioner that all that is involved in loan sharking is a traditional local activity. It appears instead that loan sharking in its national setting is one way organized interstate crime holds its guns to the heads of the poor and rich alike and siphons funds from numerous localities to finance its national operations." (402 U.S. 157)

It is difficult to imagine a case further removed from that of *Perez v. United States*, than the present case. In this case the government proved and the record of trial showed that (1) the credit transaction was lawful and without interest, (2) there was no prior pattern of loans, extortionate or otherwise, by the creditor, (3) the alleged collector had no history of such collections, (4) there was no slight inference of organized criminal activity, and (5) there was no violence and even though the debtor failed to pay any part of the obligation, no action was ever taken by the creditor or the "alleged collector" to enforce the obligation.

In the Third Circuit in *United States v. Keresty*, 465 F.2d 36 (1972), a case arose out of an alleged gambling obligation. The court described as "bizarre," a series of strategies which were used for the purpose of collection of the "obligation." Numerous references were made to "the syndicate" and in fact direct threats apparently were made upon the life of the alleged debtor.

In any event, the attack made upon the statute in *Keresty* is basically the same as we make here with the exception that we say that although Congress has found that a particular activity specifically in this case "loan sharking" effects interstate commerce that finding does not preclude further examination by the courts. *Katzenbach v. McClung*, 379 U.S. 294 (1964). In this case, we are face to face with ". . . . the dubious assumption that a loan from a friend would occasion a federal prosecution." *United States v. Perez*, 426 F.2d 1073, 1080 (2nd Cir. 1970) *aff'd Perez v. United States*, 402 U.S. 146 (1971). It is impossible to believe that every trivial insignificant and purely local act be made a federal crime without any requirement of a showing of any connection with or effect upon the evil sought to be controlled or any relationship with the jurisdiction conferred upon Congress by the United States Constitution.

As we have stated, we have been unable to find any case reported which so nearly equates with the outlandish hypothetical cases proposed by appellants in other cases, as the one before this court.

It is inconceivable that the *Tenth Amendment* to the *Constitution* has been so eroded by the passage of time as to permit Congress to invade the province of the states to such a degree.

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

/s/ Frederic C. Ritger, Jr.
FREDERIC C. RITGER, JR.
Counsel for Petitioners
106 Valley Street
South Orange, New Jersey 07079

ADDENDUM "A"

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 76-1170 & 76-1171

UNITED STATES OF AMERICA

vs.

ROBERT DIACO
JOHN HOLLAND

ROBERT DIACO, *Appellant in No. 76-1170*

John Holland, *Appellant in No. 76-1171*
(D.C. Criminal No. 75-325)

Appeal from the United States District Court for the District of New Jersey

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Submitted under 3rd Cir. Rule 12(6) June 11, 1976
Before VAN DUSEN, GIBBONS and ROSENN,
Circuit Judges

Frederic C. Ritger, Jr., Esq.,
South Orange, New Jersey,
Attorney for Appellant Diaco
William G. Scott, Esq., of Maher & Scott,
Portsmouth, New Hampshire,
Attorney for Appellant Holland
Jonathan L. Goldstein,
U.S. Attorney;
Maryanne T. Desmond,
Assistant U.S. Attorney;
John J. Barry, Assistant
U.S. Attorney;
Newark, New Jersey,
Attorneys for Appellee

JUDGMENT ORDER

After consideration of the contentions raised by appellants, namely:

(1) that the trial court erred in refusing to provide the jury, upon its request, with a transcript of the defendants' testimony or by having the testimony read to the jury;[1]

(2) That the trial court erred in refusing to grant the defendants' motion for a psychiatric examination of the witness Vincent Bono, or, in the alternative, to hold a hearing outside the presence of the jury, as to the competency of Bono;[2]

(3) that the indictment should be dismissed where the grand jury was presented with insufficient evidence to establish probable cause;[3]

(4) that if the Government unnecessarily relied upon hearsay testimony before the grand jury, the indictment should be dismissed;[4]

1. The trial judge clearly explained to the jurors why the printed transcript could not be given to them. App. at 988a-89a; *see also* App. at 974a. The jury coud have specifically requested that the testimony be read to them, but it did not. App. at 995a. We cannot say that the trial judge's refusal to inform the jury that it could request to have the transcript read constitutes reversible error.

2. A psychiatric examination

> "'may seriously impinge on a witness' right to privacy; . . . the examination itself coud serve as a tool of harassment;' and the likelihood of an examination could deter witnesses from coming forward. . . . The resultant presumption against ordering an examination must be overcome by a showing of need."

United States v. Butler, 481 F.2d 531, 534 (D.C. Cir. 1973). See *United States v. Heinlein*, 490 F.2d 725 (D.C. Cir. 1973). Defendants failed to make any showing of need. The allegations made regarding Bono relate primarily to his credibility, not his competency. The credibility of a witness is for the jury to consider, and the district judge properly permitted evidence tending to impeach Bono's credibility to be weighed by the jury.

3. See *United States v. Calandra*, 414 U.S. 338, 344-45 (1974).

4. See *id.*; App. at 1064a-67a. This is not a case where the grand jury is misled into thinking it is getting an eye-witness account whereas it is actually receiving hearsay testimony. See *United States v. Leibowitz*, 420 F.2d 39, 42 (2d Cir. 1969). While it might have been better practice to have Bono testify before the grand jury, see ABA Standards Relating to the Prosecution Function, §3.6(a), it was not required. See *Leibowitz*, *supra*, at 41-42.

(5) that the judgment under the Consumer Credit Protection Act should be reversed because the United States District Court was without jurisdiction to hear the instant matter, and the indictment should be dismissed;[5]

(6) that the conviction below should be reversed as the court committed plain error in failing to charge an essential element of the crime as alleged in the indictment;[6] and

(7) that the trial court erred in allowing into the case an issue whose prejudice greatly outweighed its relevancy;[7] it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT:
/s/ Van Dusen,
Circuit Judge

Attest:
/s/ Thomas F. Quinn
THOMAS F. QUINN, Clerk

Dated: June 15, 1976.

5. See *Perez v. United States*, 402 U.S. 146, 153-55 (1971); *United States v. Keresty*, 465 F.2d 36, 41-43 (3d Cir. 1972).

6. The statement in *United States v. DeCarlo*, 458 F.2d 358, 367 n.12 (3d Cir. 1972) (en banc), that the state of mind of the victim is an essential element of 18 U.S.C. §894 is not a holding because it is preceded by the words "[i]t appears." Defendants neither objected to the charge as given nor raised the alleged error in their new trial motion. Moreover, the district judge's instructions carefully tracked the statute, including the relevant definitions. *Compare* 18 U.S.C. §§894, 891(7) *with* App. at 946a-49a. Under these circumstances, it is clear that plain error under F.R. Crim P. 52(b) was not committed. We note that even if the victim's state of mind is not an element of §894, it is nevertheless relevant to the question of whether a threat has been made.

7. There was no abuse of the trial judge's discretion in allowing cross-examination of this defense witness on the issue of his possible interest in favoring the defendant Diaco, particularly in view of the failure of the defense to request questioning of the jurors on voir dire as to their knowledge of adverse publicity concerning defendant Diaco's brother, Joseph and Valentine Electric Company.

ADDENDUM "B"

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT 5

Criminal actions—Provisions concerning—Due process of law and just compensation clauses.—No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT 10

Rights reserved to states or people.—The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

ADDENDUM "C"

STATUTES INVOLVED
TITLE 18 UNITED STATES CODE SECION 891

891. Definitions and rules of construction.—For the purposes of this chapter [18 USCS §§ 891-896]:

(1) To extend credit means to make or renew any loan, or to enter into any agreement, tacit or express, whereby the repayment or satisfaction of any debt or claim, whether acknowledged or disputed, valid or invalid, and however arising, may or will be deferred.

(2) The term "creditor," with reference to any given extension of credit, refers to any person making that extension of credit, or to any person claiming by, under, or through any person making that extension of credit.

(3) The term "debtor," with reference to any given extension of credit, refers to any person to whom that extension of credit is made, or to any person who guarantees the repayment of that extension of credit, or in any manner undertakes to indemnify the creditor against loss resulting from the failure of any person to whom that extension of credit is made to repay the same.

(4) The repayment of any extension of credit includes the repayment, satisfaction, or discharge in whole or in part of any debt or claim, acknowledged or disputed, valid or invalid, resulting from or in connection with that extension of credit.

(5) To collect an extension of credit means to induce in any way any person to make repayment thereof.

(6) An extortionate extension of credit is any extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making repayment or failure to make repay-

ment could result in the use of violence or other criminal means to cause harm to the person, reputation, or property of any person.

(7) An extortionate means is any means which involves the use, or an express or implicit threat of use, of violence or other criminal means to cause harm to the person, reputation, or property of any person.

(8) The term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and territories and possessions of the United States.

(9) State law, including conflict of laws rules, governing the enforceability through civil judicial processes of repayment of any extension of credit or the performance of any promise given in consideration thereof shall be judicially noticed. This paragraph does not impair any authority which any court would otherwise have to take judicial notice of any matter of State law. (May 29, 1968, P. L. 90-321, Title II, § 202(a), 82 Stat. 160.)

Findings and purpose.—Section 201 of Act May 29, 1968, cited to text, provided:

(a) The Congress makes the following findings:

(1) Organized crime is interstate and international in character. Its activities involve many billions of dollars each year. It is directly responsible for murders, willful injuries to person and property, corruption of officials, and terrorization of countless citizens. A substantial part of the income of organized crime is generated by extortionate credit transactions.

(2) Extortionate credit transactions are characterized by the use, or the express or implicit threat of the use, of violence or other criminal means to cause harm to person, reputation, or property as a means of enforcing repayment.

Among the factors which have rendered past efforts at prosecution almost wholly ineffective has been the existence of exclusionary rules of evidence stricter than necessary for the protection of constitutional rights.

(3) Extortionate credit transactions are carried on to a substantial extent in interstate and foreign commerce and through the means and instrumentalities of such commerce. Even where extortionate credit transactions are purely intrastate in character, they nevertheless directly affect interstate and foreign commerce.

(4) Extortionate credit transactions directly impair the effectiveness and frustrate the purposes of the laws enacted by the Congress on the subject of bankruptcies.

(b) On the basis of the findings stated in subsection (a) of this section [this note], the Congress determines that the provisions of chapter 42 of title 18 of the United States Code [18 USCS §§ 891-896] are necessary and proper for the purpose of carrying into execution the powers of Congress to regulate commerce and to establish uniform and effective laws on the subject of bankruptcy.

TITLE 18 UNITED STATES CODE SECTION 894

894. Collection of extensions of credit by extortionate means.—(a) Whoever knowingly participates in any way, or conspires to do so, in the use of any extortionate means

(1) to collect or attempt to collect any extension of credit, or

(2) to punish any person for the nonrepayment thereof, shall be fined not more than $10,000 or imprisoned not more than 20 years, or both.

(b) In any prosecution under this section, for the purpose of showing an implicit threat as a means of collection, evidence may be introduced tending to show that one or more extensions of credit by the creditor were, to

the knowledge of the person against whom the implicit threat was alleged to have been made, collected or attempted to be collected by extortionate means or that the nonrepayment thereof was punished by extortionate means.

(c) In any prosecution under this section, if evidence has been introduced tending to show the existence, at the time the extension of credit in question was made, of the circumstances described in section 892(b)(1) or the circumstances described in section 892(b)(2), and direct evidence of the actual belief of the debtor as to the creditor's collection practices is not available, then for the purpose of showing that words or other means of communication, shown to have been employed as a means of collection, in fact carried an express or implicit threat the court may in its discretion allow evidence to be introduced tending to show the reputation of the defendant in any community of which the person against whom the alleged threat was made was a member at the time of the collection or attempt at collection. (May 29, 1968, P. L. 90-321, Title II, § 202(a), 82 Stat. 11.)